

## Article 4.

### Creation, Validity, Modification, and Termination of Trust.

#### **§ 36C-4-401. Methods of creating trust.**

A trust may be created by any of the following methods:

- (1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death including either of the following:
  - a. The devise to the trustee of the trust as provided in G.S. 31-47.
  - b. The designation of the trust as beneficiary of life insurance or other death benefits as provided in G.S. 36C-4-401.1.
- (2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law.
- (3) Exercise of a power of appointment in favor of a trustee.
- (4) A court by judgment, order, or decree, including the establishment of a trust pursuant to section 1396p(d)(4) of Title 42 of the United States Code. (2005-192, s. 2; 2007-106, s. 14; 2009-267, s. 2; 2011-284, s. 45.)

#### **§ 36C-4-401.1. Interest of trustee as beneficiary of life insurance or other death benefit sufficient to support inter vivos or testamentary trust.**

(a) The interest of a trustee as the beneficiary of a life insurance policy is a sufficient property interest or res to support the creation of an inter vivos or testamentary trust notwithstanding the fact that the insured or any other person or persons reserves or has the right to exercise any one or more of the following rights or powers:

- (1) To change the beneficiary;
- (2) To surrender the policy and receive the cash surrender value;
- (3) To borrow from the insurance company issuing the policy or elsewhere using the policy as collateral security;
- (4) To assign the policy; or
- (5) To exercise any other right in connection with the policy commonly known as an incident of ownership of that policy.

The term "life insurance policy" includes life, annuity, and endowment contracts, or any variation or combination of those contracts, and any agreement entered into by an insurance company in connection with life, annuity, or endowments contracts.

(b) The interest of a trustee as the beneficiary of a death benefit under an employee benefit plan or group life insurance policy is a sufficient property interest or res to support the creation of an inter vivos or testamentary trust notwithstanding the fact that the insured, employer, insurer or administrator of the plan reserves or has the right to revoke or otherwise defeat the designation or assignment or to exercise any one or more of the rights or powers incident to employee benefit plans or group life insurance policies.

The term "employee benefit plan" includes pension, retirement, death benefit, deferred compensation, employment, agency, retirement annuity, stock bonus, profit-sharing or employees' savings contracts, plans, systems or trusts; and trusts, securities or accounts established or held under the federal Self-Employed Individuals Tax Retirement Act of 1962, the federal Employee Retirement Income Security Act of 1974, or similar legislation. The term "group life insurance

policy" includes group life, industrial life, accident, and health insurance policies having death benefits.

(c) A testator having the right to designate the beneficiary under a life insurance policy, employee benefit plan, or group life insurance policy described in subsection (a) or (b) of this section may designate as that beneficiary a trustee named or to be named in the testator's will whether or not the will is in existence at the time of the designation. The proceeds received by the trustee shall be held and disposed of as part of the trust estate under the terms of the will as they exist at the death of the testator. If no trustee makes claim to the proceeds within six months after the death of the testator, payments shall be made to the personal representative of the estate of the testator unless it is otherwise provided by an alternative designation or by the policy or plan. The proceeds received by the trustee is not subject to claims against the estate of the testator to estate or inheritance taxes to any greater extent than if the proceeds were payable directly to the beneficiary or beneficiaries named in the trust. The proceeds may be commingled with any other assets that may properly become part of the trust, but the proceeds shall not become part of the testator's estate for purposes of trust administration unless the will expressly so provides. (1957, c. 1444, s. 1; 1977, c. 502, s. 2; 1999-337, s. 7(j); 2005-192, s. 2.)

#### **§ 36C-4-401.2. Creation of trust by a court.**

A court may create or establish a trust by judgment or decree, including a trust pursuant to section 1396p(d)(4) of Title 42 of the United States Code, upon petition of an interested party in accordance with the provisions of this Chapter or in any other matter properly before the court. (2009-267, s. 3; 2010-97, s. 5(a).)

#### **§ 36C-4-402. Requirements for creation.**

(a) A trust is created only if:

- (1) The settlor has capacity to create a trust;
- (2) The settlor indicates an intention to create the trust;
- (3) The trust has a definite beneficiary or is:
  - a. A charitable trust;
  - b. A trust for the care of an animal, as provided in G.S. 36C-4-408; or
  - c. A trust for a noncharitable purpose, as provided in G.S. 36C-4-409;
- (4) The trustee has duties to perform; and
- (5) The same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails, and the property subject to the power passes to the persons who would have taken the property had the power not been conferred. (2005-192, s. 2.)

#### **§ 36C-4-403. Trusts created in other jurisdictions.**

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

- (1) The settlor was domiciled, had a place of abode, or was a national;
- (2) A trustee was domiciled or had a place of business; or

- (3) Any trust property was located. (2005-192, s. 2.)

**§ 36C-4-404. Trust purposes.**

A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries. (2005-192, s. 2.)

**§ 36C-4-405. Charitable purposes.**

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, benevolent, literary, governmental, or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) It is the policy of the State that a gift for charitable purposes, whether in trust or otherwise, is valid, notwithstanding the fact that the gift is made in general terms, and this section shall be construed liberally to effect this policy.

(c) No gift for charitable purposes, whether in trust or otherwise, is void or invalid because:

- (1) The gift is in general terms or is uncertain as to the specific charitable purposes;
- (2) When the gift is made in trust, the trustee is granted discretionary powers in the selection and designation of the beneficiaries of that charitable trust or in carrying out the purpose of that trust;
- (3) The trustee or other recipient of the gift is given no specific instructions, powers, or duties as to the manner or means of carrying out those charitable purposes; or
- (4) The gift contravenes any statute or rule against perpetuities.

(d) When any gift is made in general terms, the trustee or other recipient of the gift may:

- (1) Select from time to time one or more specific charitable beneficiaries or purposes for which any trust or property or income is held and administered; and
- (2) Determine the means to accomplish those charitable purposes, unless otherwise provided, including the creation of corporations or other legal entities for those purposes.

(e) For purposes of this section, the reference to a "gift" includes both inter vivos and testamentary gifts, grants, and other transfers. (2005-192, s. 2.)

**§ 36C-4-405.1. Enforcement of charitable gift or trust.**

(a) The settlor of a charitable trust, the Attorney General, the district attorney, a beneficiary, or any other interested party may maintain a proceeding to enforce a charitable trust, including the following:

- (1) A proceeding to require a trustee to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the trust was established, as provided in subdivisions (d)(1) and (d)(2) of G.S. 36C-4-405;
- (2) A proceeding for breach of fiduciary duty if there is reason to believe that the trust property has been mismanaged through negligence or fraud; and
- (3) A proceeding for an accounting of the trustee's administration of the trust.

(b) The donor of a charitable gift, the Attorney General, the district attorney, or any other interested party may maintain a proceeding to enforce the gift, including a proceeding to require the recipient of the gift to make a selection as may be necessary to establish the charitable

beneficiaries or purposes for which the gift was intended, as provided in subdivisions (d)(1) and (d)(2) of G.S. 36C-4-405. (2005-192, s. 2.)

**§ 36C-4-405.2. Spending rules applicable to charitable trusts.**

Subject to the intent of a settlor specifically expressed in a trust instrument, including a document making a gift to a charitable trust after it is established, a trustee of a charitable trust may appropriate for expenditure or accumulate so much of the trust property as the trustee determines is prudent for the uses, benefits, purposes, and duration for which that charitable trust is established. In making a determination to appropriate or accumulate trust property, a trustee shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

- (1) The duration and preservation of the trust;
- (2) The purposes of the trust;
- (3) General economic conditions;
- (4) The possible effect of inflation or deflation;
- (5) The expected total return from income and the appreciation of investments;
- (6) Other resources of the trust; and
- (7) The investment policy of the trust. (2009-8, s. 3.)

**§ 36C-4-406. Creation of trust induced by fraud, duress, or undue influence.**

A trust is voidable to the extent that its creation was induced by fraud, duress, or undue influence. (2005-192, s. 2.)

**§ 36C-4-407. Evidence of oral trust.**

Except as required by a State statute other than this Chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust, and its terms may be established only by clear and convincing evidence. (2005-192, s. 2.)

**§ 36C-4-408. Trust for care of animal.**

(a) Subject to this section, a trust for the care of one or more designated domestic or pet animals alive at the time of creation of the trust is valid.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the designated animal or animals.

(c) The trust terminates at the death of the animal or last surviving animal. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

- (1) As directed in the trust instrument.
- (2) If the trust was created in a preresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will.
- (3) If no taker is produced by the application of subdivision (1) or (2) of this subsection, to the settlor, if then living, otherwise to the settlor's heirs determined as of the date of the settlor's death under Chapter 29 of the General Statutes.

(d) The intended use of the principal or income can be enforced by a person designated for that purpose in the trust instrument or, if none, by a person appointed by the clerk of superior court having jurisdiction over the trust upon application to the clerk of superior court by a person.

(e) Except as ordered by the clerk of superior court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the settlor. Extrinsic evidence is admissible in determining the settlor's intent.

(g) The clerk of superior court may reduce the amount of the property transferred, if the clerk of superior court determines that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c) of this section.

(h) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, the clerk of superior court must name a trustee. The clerk of superior court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. The clerk of superior court may also make other orders and determinations as are advisable to carry out the intent of the settlor and the purpose of this section. (1995, c. 225, s. 1; 2005-192, s. 2; 2006-259, s. 13(b).)

#### **§ 36C-4-409. Noncharitable trust without ascertainable beneficiary.**

Except as otherwise provided in G.S. 36C-4-408 or by another statute, the following rules apply:

- (1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years. If the trust is still in existence after 21 years, the trust shall terminate. The unexpended trust property shall be transferred in the following order:
  - a. As directed in the trust instrument.
  - b. If the trust was created in a preresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will.
  - c. If no taker is produced by the application of sub-subdivisions a. or b. of this subdivision, to the settlor, if then living, otherwise to the settlor's heirs as determined under Chapter 29 of the General Statutes as of the date of the settlor's death.
- (2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.
- (3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for the intended use. The property not required for the intended use shall be distributed under subdivision (1) of this section.
- (4) Notwithstanding subdivisions (1) through (3) of this section, a trust, contract, or other arrangement to provide for the care of a cemetery lot, grave, crypt, niche, mausoleum, columbarium, grave marker, or monument is valid without regard

to remoteness of vesting, duration of the arrangement, or lack of definite beneficiaries to enforce the trust, provided that the trust, contract, or other arrangement meets the requirements of G.S. 28A-19-10, Article 4 of Chapter 65 of the General Statutes, Article 9 of Chapter 65 of the General Statutes, or other applicable law. This section does not repeal or supersede G.S. 36C-4-413. (1995, c. 225, s. 1; 2005-192, s. 2; 2007-106, s. 15.)

**§ 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.**

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires under its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416. A settlor may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee is a necessary party to any proceeding under this Article.

(c) Repealed by Session Laws 2006-259, s. 13(c), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(c); 2007-106, s. 16.)

**§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.**

(a) If the settlor and all beneficiaries of a noncharitable irrevocable trust consent, they may compel the modification or termination of the trust without the approval of the court even if the modification or termination is inconsistent with a material purpose of the trust. If any beneficiary (i) is a minor or incompetent or a person who is unborn or whose identity or location is unknown and (ii) is unable to be represented under Article 3 of this Chapter, the settlor or any competent adult beneficiary or the representative of any beneficiary properly represented under Article 3 of this Chapter may institute a proceeding before the court to appoint a guardian ad litem. The court shall allow the modification or termination if the court finds that, following the appointment of a guardian ad litem, all beneficiaries or their representatives have consented. A settlor's power to consent to a trust's modification or termination may be exercised by the following:

(1) An agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust.

(2) The settlor's general guardian or the guardian of the estate with the approval of the court supervising the guardianship.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries, if the court concludes that modification is consistent with a material purpose of the trust.

(c) If the beneficiaries of a noncharitable irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust may be modified or terminated, in the discretion of the court, only if the court determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b), or (c) of this section, the modification or termination may be approved by the court if the court is satisfied that all of the following apply:

(1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section.

(2) The interests of a beneficiary who does not consent will be adequately protected.

(e) Repealed by Session Laws 2006-259, s. 13(d), effective October 1, 2006.

(f) In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust under this section, the presumption of fertility is rebuttable.

(g) If a trust instrument provides for the disposition of property to a class of persons described only as "heirs" or "next of kin" of any person or uses other words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances.

(h) Except for the modification of a trust pursuant to subsection (a) of this section, nothing in this section permits the modification of a trust to provide for the removal and replacement of a trustee of the trust, including the addition of trust terms providing for the removal and replacement of the trustee by one or more beneficiaries or other persons. (2005-192, s. 2; 2006-259, s. 13(d); 2007-106, s. 17; 2019-113, s. 6; 2023-46, s. 7.)

#### **§ 36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.**

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Repealed by Session Laws 2006-259, s. 13(e), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(e).)

#### **§ 36C-4-413. Cy pres.**

(a) Except as otherwise provided in subsections (c1) and (d) of this section, if a charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) The trust does not fail, in whole or in part;

(2) The trust property does not revert to the settlor or the settlor's successors in interest; and

(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) The settlor or a trustee of a charitable trust, the Attorney General, a beneficiary, or any other interested party may maintain a cy pres proceeding under Article 2 of this Chapter.

(c) Repealed by Session Laws 2007-106, s. 17.1, effective October 1, 2007.

(c1) If a trustee of a charitable trust determines that a restriction contained in the trust instrument, including a document making a gift to a charitable trust after it is established, relating

to the management, investment, or purpose of the trust or gift is unlawful, impracticable, impossible to achieve, or wasteful, the trustee may release or modify the restriction, in whole or part, if:

- (1) The trust property to which the restriction applies has a total value of less than one hundred thousand dollars (\$100,000);
- (2) More than 10 years have elapsed since the trust property to which the restriction applies was given to the charitable trust; and
- (3) The trustee uses the trust property in a manner consistent with the charitable purposes expressed in the applicable trust instrument.

The trustee must provide written notice of the proposed release or modification of the restriction to the Attorney General not less than 60 days before releasing or modifying the restriction. The Attorney General may make application to the court to contest the trustee's determination that the restriction should be released or modified within 60 days of receipt of the trustee's written notice.

(d) This section is not applicable if the settlor has provided, either directly or indirectly, for an alternative plan in the event that the charitable trust is or becomes unlawful, impracticable, impossible to achieve, or wasteful. However, if the alternative plan is also a charitable trust and that trust fails, the intention shown in the original plan shall prevail in the application of this section. (2005-192, s. 2; 2007-106, s. 17.1; 2009-8, s. 4.)

#### **§ 36C-4-414. Modification or termination of uneconomic trust.**

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value of less than fifty thousand dollars (\$50,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. The trustee may enter into an agreement or make other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. This subsection shall not apply where the instrument creating the trust, by specific reference to this section, or to former G.S. 36A-125.6, provides that it shall not apply. The trustee shall not be liable for that termination and distribution notwithstanding the existence or potential existence of other beneficiaries who are not sui juris. Any beneficiary receiving a distribution from a trust terminated under this section shall incur no liability and shall not be required to account to anyone for such distribution.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(c) This section does not apply to an easement for conservation or preservation.

(d) Repealed by Session Laws 2006-259, s. 13(f), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(f).)

#### **§ 36C-4-415. Reformation to correct mistakes.**

The court may reform the terms of a trust, if the terms of the trust are ambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence what the settlor's intent was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. (2005-192, s. 2; 2017-152, s. 4.)

#### **§ 36C-4-416. Modification to achieve settlor's tax objectives.**



To achieve a settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect. (2005-192, s. 2; 2006-259, s. 13(g).)

**§ 36C-4-417. Combination and division of trusts.**

(a) Unless otherwise provided in the trust instrument, a trustee may do any of the following:

- (1) Consolidate the assets of more than one trust and administer the assets as one trust under the terms of one of the trusts if the terms of the trusts are substantially similar and the beneficiaries of the trusts are identical.
- (2) Divide one trust into two or more separate trusts if the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

(b) In dividing a trust into two or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (i) with a pro rata portion of each asset held by the undivided trust; or (ii) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(c) In any case where two separate identical trusts are created under this section, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the trustee may thereafter, to the extent possible consistent with the terms of the trust, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy those distributions by a method other than pro rata from the separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax. (2005-192, s. 2; 2006-259, s. 13(h).)

**§ 36C-4-418. Distribution upon termination of trust.**

Upon termination of a trust under G.S. 36C-4-411(a), the trustee shall distribute the trust property as agreed by the beneficiaries. Upon termination of a trust under G.S. 36C-4-411(b) or (c), the trustee shall distribute the trust property in accordance with the order entered by the court. Upon termination of a trust under G.S. 36C-4-412(a) or G.S. 36C-4-414, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. (1999-266, s. 2; 2005-192, s. 2; 2007-106, s. 18.)

**§ 36C-4-419. Effect of inalienable interest on modification or termination.**

The court, in exercising its discretion to modify or terminate an irrevocable trust under G.S. 36C-4-411, 36C-4-412, or 36C-4-414 shall consider provisions making the interest of a beneficiary inalienable, including those described in Article 5, but the court is not precluded from the exercise of that discretion solely because of such provisions. (2005-192, s. 2; 2006-259, s. 13(i).)